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IN THE

Supreme Court of the United States

ZEIREI AGUDATH ISRAEL and LEVI SUFRIN,
on Behalf of Themselves and All Others Similarly Situated,

Petitioners,

v.

AVIS RENT A CAR SYSTEM, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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Petitioners Zeirei Agudath Israel ("ZAI") and Levi Sufrin respectfully submit this brief in reply to Respondent Avis Rent A Car Inc.'s ("Avis") brief in opposition to ZAI and Levi Sufrin's Petition for a Writ of Certiorari ("Avis Opp.").

INTRODUCTION

The importance of this case, and the need for this Court to grant certiorari, arise from Avis' establishment of its unlawful "Yeshiva" policy — a company-wide policy of blatantly unlawful discrimination in violation of Section 1981 — and the Eleventh Circuit panel's decision below reversing the District Court's certification pursuant to subdivisions (a) and (b)(3) of Federal Rule of Civil Procedure 23 ("Rule 23"). The cert-worthy legal and public policy issues underlying this Petition are not, as Avis would have it, the result of "medieval alchem[y]," nor did the Eleventh Circuit panel decision "merely involve[ ] a routine application of Rule 23." Avis Opp. at 17.

Avis stubbornly refuses to recognize the critical importance of this Court's holding in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) to disparate treatment discrimination cases brought as class actions under Rule 23, whether or not the unlawful discriminatory practice involves employment. Similarly, Avis does not squarely address the significance of the Eleventh Circuit panel's erroneous analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), as being applicable only to employment discrimination, as opposed to other types of illegal discrimination.

What is at stake in this case is the determination of the procedural means and evidentiary methods available to private parties to enforce the Nation's anti-discrimination civil rights laws effectively in our federal courts. The decision below directly puts into issue the applicability of the *Teamsters* class-wide presumption of intentional discrimination based upon a showing of a "pattern or practice" of discrimination, to

certification under Rule 23. It also directly puts into question whether the burden shifting rules for a *prima facie* discrimination case in an individual action, established by the Court in *McDonnell Douglas*, are uniquely applicable to employment discrimination, the position taken by the Eleventh Circuit panel, or are applicable to other types of unlawful disparate treatment discrimination cases, the position taken by the Second, Third, Sixth, Eighth, Ninth, and Tenth Circuits.

Avis opposes the Petition based largely on: (a) attempts to minimize the significance and perniciousness of Avis' admitted "Yeshiva" policy; (b) self-servingly edited snippets of deposition testimony; (c) conclusory assertions of fact not established in the record; and (d) complaints about Avis' unsuccessful attempts to extinguish this case early through motion practice. None of these arguments are appropriate in this Court, nor are any of them even relevant to the issue of whether this case is worthy of certiorari.

Avis' merits arguments defending its Yeshiva policy and its litany of complaints about adverse procedural rulings in the District Court, do nothing to undercut the importance and seriousness of these issues. Moreover, in making its arguments, Avis has tellingly omitted a number of record facts, for example:

• In support of its "categorical" denials of discrimination (but not the existence of its "Yeshiva" policy), Avis cites a March 7, 1997 *Newsday* article reporting that the Anti-Defamation League of B'nai Brith did not believe that Avis had a policy of discriminating against Jews. Avis Opp. at 2 n.3. Avis neglects to point out, however, that this case was not filed until weeks after the article — and that therefore the ADL was not and could not know the full extent of the charges against Avis, or about the written evidence documenting its unlawful Yeshiva policy. Indeed, the *Newsday* article does not even suggest that the ADL had investigated the charges underlying this action, noting only that the CEO of Avis' corporate parent had assured the ADL

that the charges "were being taken seriously." (Supp. R. IX-194, Ex. A.)[1] Neither did Avis report that the article also quoted Israel Abraham, a New York Jewish leader, as stating: "Avis, you are Number Two, and now we know the reason. . . . The only thing you try harder is to discriminate." (*Id.*)[2]

• Avis plaintively complains about the outcome of various motions in the District Court, including the denial of Avis' motions to dismiss, for summary judgment, and to transfer the case to Oklahoma, and the granting of Petitioners' motion for ZAI to intervene as a plaintiff and class representative after it had become apparent that the original plaintiff, Ruttstein, had abandoned the action. Apparently seeking to portray the District Court as a forum unfairly hostile to Avis, Avis leaves out of its lengthy procedural history the fact that on May 1, 1998 Avis filed a lengthy petition for mandamus with the Eleventh Circuit challenging the District Court's denial of Avis' motion to transfer and the granting of ZAI's motion to intervene. And that on May 15, 1998, the Eleventh Circuit denied Avis' petition.

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1. The "R" and "Supp. R" citations refer to the volume number of the original record, docket number, and where applicable, the exhibit or tab within the document and/or the page number.

2. In this same vein, while vehemently denying that its Yeshiva policy had anything to do with discriminatory practices, and implying support from the ADL for its denials, Avis never mentions that *amici* briefs were filed in the Eleventh Circuit on behalf of ZAI and Sufrin by the N.A.A.C.P., the American Jewish Congress, the Georgia State Conference of the N.A.A.C.P., the Mexican American Legal Defense and Educational Fund, the National Council of Jewish Women, the National Organization of Women Legal Defense and Education Fund, and the Rainbow Push Coalition.

ARGUMENT

I.

THE *TEAMSTERS* DECISION IS DIRECTLY RELEVANT TO RULE 23 CLASS CERTIFICATION IN THIS CASE.

Avis relies on an amalgam of three unrelated, but equally mistaken, arguments in support of its assertion that the panel's decision below does not conflict with *Teamsters*. Avis claims that: (a) *Teamsters* does not even address Rule 23 (Avis Opp. at 18-19); (b) the Eleventh Circuit panel's result was "mandated" by *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997), a case not challenged in this Petition, and, which, in any event, cannot justify a result in conflict with a decision of this Court. (*id.* at 19-24); and (c) *Teamsters* is distinguishable based on the distinction between equitable and legal relief (*id.* at 24-27).

First, the claim that "*Teamsters* does not address Rule 23" could not be further from the fact. Even the panel below expressly acknowledged that it "is clear that *Teamsters* applies in private class actions." Pet. App. at 20a. Indeed, the *Teamsters* burden shifting procedure was first applied by this Court in a private class action, *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976). In the course of reversing a District Court's denial of certain relief to unnamed numbers of a private class asserting job discrimination claims, the Court stated:

> We read [the] District Court[ ] . . . . [as] express[ing] concern that some of the *unnamed class numbers* . . . . may not in fact have been actual victims of racial discrimination . . . . Generalizations concerning such individually applicable evidence cannot serve as justification to deny relief *to the entire class* . . . . [P]etitioners here have carried their

> burden of demonstrating the existence of a discriminatory hiring practice by the respondents and, therefore, the burden will be on the respondents to prove that individuals who reapply were not in fact victims of previous hiring discrimination.

424 U.S. at 772 (emphasis added); *id.* at 773 n.32 (respondent may attempt to prove a given individual member of the class not discriminated against "in order to defeat the individual's claim to seniority relief as well as any other remedy ordered for the class generally"). *See also Teamsters*, 431 U.S. at 362 (the burden shifting in this government prosecuted case was the same "[a]s in *Franks*").

Second, Avis faults Petitioners for not arguing that the *Jackson* case was incorrectly decided and also claims that "plaintiffs . . . have abandoned their argument that *Jackson* is distinguishable from this case." Avis Opp. at 24. The former proposition is irrelevant: Petitioners are not seeking review of *Jackson*, but of the panel decision in *Israel*. The latter proposition is wrong: Petitioners credited the District Court for having correctly "recognized the fundamental difference between this case and [*Jackson*]" — *i.e.*, the difference between a case based on numerous separate acts of wrongdoing anecdotally reported by individual plaintiffs (as in *Jackson*), and this case, in which there is "significant proof of a company-wide discriminatory policy." Petition at 5-7 (citations omitted). Whether or not *Jackson* was correctly or incorrectly decided is not relevant to this Petition.[3]

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3. Avis nevertheless relies heavily not only on *Jackson v. Motel 6*, but also on *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), a Fifth Circuit case with no binding effect on *any* court in the Eleventh Circuit let alone on this Court:

> In the final analysis, plaintiffs are attempting to circumvent *Jackson* and *Allison* by seizing on the burden-shifting framework of *Teamsters* as support for their proposition

(Cont'd)

Avis mischaracterizes and distorts both Petitioners' position in this case and this Court's holding in *General Tel. Co. v. Falcon*, 457 U.S. 147 (1982). As the District Court correctly found, this case does not rest on a mere "allegation" of a company-wide policy of discrimination. To the contrary, the record of Avis' Yeshiva policy does precisely what this Court demanded in *Falcon*; it "bridge[s] the gap" between the individual experience of discrimination by a plaintiff or group of plaintiffs and Avis' establishment and implementation of a company-wide policy of unlawful discrimination. *Falcon*, 457 U.S. at 157-59.

Third, Avis' argument that differences between equitable remedies and "money damages" distinguishes this case from *Teamsters* fails for the same reasons the Eleventh Circuit panel's identical holding is in error. *See* Petition at 23-26. Apart from the panel decision itself, Avis has only the *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998) case from the Fifth Circuit, and two District Court cases to support its mistaken assertion that even punitive damages raise individual issues that preclude a finding of the predominance required under Rule 23(b)(3). Avis Opp. at 25-26. In a misguided effort to broaden this thin reed, Avis then goes on — disingenuously — to represent *Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir.), *cert. denied*, 121 S. Ct. 381 (2000), as having "called into question" the Eleventh Circuit's recognition that punitive damages are, indeed, a class-wide remedy. Avis Opp. at 25-26 and n.11.[4]

(Cont'd)

> that an allegation of a policy of discrimination above is sufficient to warrant class certification. That is simply not the law.

Avis Opp. at 24, citing *General Tel. Co. v. Falcon*, 457 U.S. 147, 157 (1982).

4. *Cohen* does no such thing. Rather, it addresses that propriety of "aggregating" punitive damages in a class case for purposes of calculating the "amount in controversy" for diversity jurisdiction. (Cont'd)

II.

THE DECISION BELOW CONFLICTS WITH SIX OTHER COURTS OF APPEALS.

Avis tries to avoid the palpable split in the Circuits created by the Eleventh Circuit's decision by simply closing its eyes to the panel's detailed analysis of specific employment related elements of *McDonnell Douglas* as a means to justify distinguishing this case from both *McDonnell Douglas* and *Teamsters*, and thus denying Petitioners the class-wide presumption of intentional discrimination that arises from evidence of a corporate pattern and practice of discrimination. *See, e.g.*, Pet. App. at 22a-26a. The panel below bases its distinction on the fact that Petitioners' claims arise from *non-employment* related discrimination, which, according to the panel, is not amenable to the same burden shifting rules that apply to employment discrimination claims. *Id.* Avis ignores the panel's lengthy discussion of the interplay and relationship between the allocation of burdens in a class employment discrimination case, as in *Teamsters*, and in an individual employment discrimination case, as in *McDonnell Douglas*. Pet. App. at 22a-26a. The linchpin of the panel's analysis — and its result — is its holding that the burden shifting rules in *McDonnell Douglas* and *Teamsters* are appropriate for employment, but not for non-employment, discrimination cases. Pet. App. at 25a-26a.

Avis is far off the mark when it claims that the panel's reliance on *McDonnell Douglas* "merely stated that the plaintiff

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(Cont'd)

Specifically, the Eleventh Circuit held that a punitive damages claim must be divided by the number of alleged class members for amount in controversy purposes — a holding that supports rather than undermines punitive damages as a uniform class-wide remedy involving questions that predominate over individual questions. *See Cohen*, 204 F.3d at 1076-77.

here will have to show an intent to discriminate by Avis as part of their *prima facie* case." Avis Opp. at 28-29 (citing Pet. App. at 15a-16a, a section of the panel's decision that discusses *McDonnell Douglas* only in a footnote; tellingly, Avis *never* discusses the panel's later detailed analysis and discussion of *McDonnell Douglas* (*see* Pet. App. at 22a-26a.)).

Aside from ignoring the panel's dispositive (and erroneous) interpretation of *McDonnell Douglas*, the only other argument Avis advances against there being a Circuit split is based on two earlier decisions by Eleventh Circuit panels affirming the use of *McDonnell Douglas* burden shifting in non-employment discrimination cases. Avis Opp. at 28 n.13. Avis argues that because in the Eleventh Circuit a panel cannot overturn an earlier panel holding, to the extent the decision below conflicts with holdings of other Circuits it is really of no significance. *Id.* Unlike the decision below, however, neither of the earlier Eleventh Circuit panel decisions did more than summarily affirm the use of *McDonnell Douglas* burden shifting without *any* analysis or discussion. *See Brown v. American Honda Motor Co.*, 939 F.2d 946 (11th Cir. 1991); *Secretary, United States Dep't Housing & Urban Dev. ex rel. Herron v. Blackwell*, 908 F.2d 864 (11th Cir. 1990). In contrast, the decision below, which already has been cited by courts within and without the Eleventh Circuit,[5] elaborately articulates a line of erroneous reasoning, interpretation, and analysis of two of this Court's precedents

5. *E.g.*, *Prado-Steiman v. Bush*, 221 F.3d 1266, 1275 (11th Cir. 2000) (granting Rule 23(f) petition); *Moore v. American Federation of Television & Radio Artists*, 216 F.3d 1236, 1243 (11th Cir. 2000) (affirming denial of class certification); *Simon v. Philip Morris Inc.*, 2001 U.S. Dist. LEXIS 1114 at *72 (E.D.N.Y. Feb. 8, 2001) (Rule 23(f)); *Miller v. Hygrade Food Products Corp.*, 2001 U.S. Dist. LEXIS 733 at *18-*20 (E.D. Pa. Jan. 29, 2001) (denying motion to certify a Rule 23(b)(3) class in a Title VII case); *Neenan v. Carnival Corp.*, 2001 U.S. Dist. LEXIS 885 at *11-*15 (S.D. Fla. Jan. 23, 2001) (denying Rule 23(b)(3) certification motion); *Shelley v. AmSouth Bank*, 2000 U.S. Dist. LEXIS 11429 at *19, *22-*23 (S.D. Ala. July 25, 2000) (denying Rule 23(b)(3) certification).

— *McDonnell Douglas* and *Teamsters* — that is in conflict with decisions from six other Courts of Appeals. This case presents exactly the type of unsettled uncertainty in a critical area of the law that calls for resolution by this Court.

CONCLUSION

For all of the foregoing reasons, and for the reasons in the original Petition, the Petition for a Writ of Certiorari, should be granted.

Respectfully submitted,

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